IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2160 OF 2005

Forbes Gokak Ltd., .. Petitioners.

vs.

Smt. Nafisa G. Sheikh

& Anr. .. Respondents.

Mr. J.P. Cama i/by Pram Ranga for petitioners.

Mr. A.V. Bukhari for respondents.

CORAM : S.U. KAMDAR, J.

DATE : 17th April, 2006.

P.C.:

. The present petition is filed for challenging the order passed by the Presiding Officer of the 10th Labour Court, Mumbai.

2. The services of the respondent workman were terminated on the ground of ill-health. The said termination order is issued on 23.7.1990 It is an admitted fact that the termination is without charge sheet and without enquiry. However, the learned counsel for the petitioner has contended that in view of the definition of retrenchment under Section

2 (oo) (c), the termination on the ground of ill-health does not amount to retrenchment and, therefore, there is no need to conduct enquiry or issuing of charge sheet. He has further submitted that section 2(oo) even covers those cases where termination of service is simplicitor on the ground of ill-health amounting to dismissal. A plain reading of section 2 (oo)(c) makes it clear that retrenchment means termination by the employer of the service of a workman for any reason whatsoever, other than as a punishment inflicted by way of disciplinary action. However to the said Section exceptions are carved out one of which is termination on the ground of ill-health and it is provided that such termination would not amount to retrenchment. In my opinion the provision of Section 2(oo)(c) has no application where admittedly it is nobody's case there. The respondent workman is retrenched. It is the case of respondent that the respondent's services are wrongfully terminated without enquiry. In my opinion, If the petitioner has terminated the services of the respondent on the ground that the respondent is not attending the service because of ill-health then in that event it is a termination not simplicitor but by way of punishment and so it is necessary to issue a charge sheet and holding of an enquiry. In view of the fact that no charge sheet is issued, no enquiry is conducted, the Labour Court was right and justified

in holding that the termination is illegal and consequently granting reinstatement to the respondent herein.

3. The learned counsel for the petitioner in support of the aforesaid contention has also cited the judgment of the Division Bench in the case of Ramaswamy Murugesh vs. S.G. Bhonsale, & Anr., reported in 2005 III CLR 120. On the reading of the aforesaid judgement it is clear that it has totally no application on the facts of the present case. That was the judgment where the argument of the workman was that by virtue of dismissal of the services on the ground of ill-health the workman has been retrenched without following the provisions contained under Section 25 F of the Industrial Disputes Act, 1947. The Court by relying upon the definition of 'retrenchment' under section 2 (oo) and exclusion clause under sub clause (c) has held that the termination of the services of the workman on the ground of continued ill-health would not amount to retrenchment. In the present case, it is nobody's case that this is a case of retrenchment. The argument of the respondent before the trial Court was that the termination is illegal because it was conducted without enquiry and without any charge sheet. In that light of the matter, I do not find any application of the said judgment to the facts of the present case.

4. The learned counsel for the petitioner has thereafter contended that the Labour Court while granting back wages of 50% has not taken into consideration the various factors which the Labour Court was legally bound to do so. He has further submitted that the burden of proof to show that the respondent was not in gainful employment was on the respondent and, therefore, even though the petitioner has led no evidence and has not proved any gainful employment of the respondent still the Labour Court could not have granted 50% back wages as has been done in para 22 of the said judgment. In support of the aforesaid contention the learned counsel for the petitioner has relied upon the judgment of the learned Single Judge of this Court in the case of Navin J. Surti v. Modi Rubber Ltd., & Anr., reported in 2004 II CLR 46, the judgment of the Division Bench of this Court in the case of Sadanand Patamkar and New Prabhat Silk Mills, reported in 1974 II LLJ 52 and the latest judgment of the Apex Court in the case of General Manager, Haryana Roadways vs. Rudhan Singh, reported in 2005 II CLR 1055. The learned counsel for the petitioner relying upon the aforesaid judgement has contended that the trial Court has erred in granting the back wages. In the present case, the respondent-employee has led the evidence and in the examination-in-chief it has been categorically deposed as under :-

"8. I say that I am unemployed through out since termination of my services despite my efforts for securing suitable job. I say that I was searching for service while in Mumbai upto the year 1994 and after 1994 I have shifted to Deolali Camp, Tal. & Dist. Nashik due to retirement of my husband and I have been searching for the suitable job in Nashik also till this date."

The deponent was cross-examined by the petitioner and in cross-examination, she has deposed as under :-

" I tried for my employment with Glaxo, Mahindras and VIP industries at Nasik as I shifted to Nasik. I did not mention the absentism but I can prove I did not receive any call from the aforesaid company prior to shifting to Nasik. I had applied to other company for my employment. I do not remember exact date of apply. I did not file the copy on record. It is not true to say that I never applied to any company for my employment. It is not true to say that I am deposing false."

In my opinion, on the basis of the evidence as it is

on record, it has been established that the respondent was not in gainful employment and inspite of taking efforts she could not obtain any employment. Her cross-examination does not shake the evidence of the respondent which she has deposed in the examination-in-chief. In fact in the cross-examination also she has deposed the name of the companies where she made efforts and she could not get the employment. After conducting cross-examination to that extent the case has been given up. As against this evidence the petitioner company has not stepped in the witness box at all. In view of the aforesaid facts, on the facts of the present case the respondent has discharged the burden of establishing that she was not gainfully employed and as such she was entitled to reinstatement with full back wages. However, the Labour Court has taken into consideration the various factors and granted only 50% back wages. In the light of the aforesaid judgments the Labour Court has itself in its discretion reduced the back wages, I do not find any reason to interfere with the same or refuse to grant back wages to the respondent who is able to discharge the burden of proving that she is not gainfully employed.

5. Now turning to the judgments which are cited by the learned counsel for the petitioner, as far as the judgment of the learned Single Judge in the case

of Navin J. Surti v. Modi Rubber Ltd., & Anr., (supra) is concerned, on the plain reading of paras 18 and 19 of the judgment, I am of the view that the issue before the Court was whether back wages in its entirety can be granted as a matter of course without evidence being led of any nature whatsoever by the employee. In para 23 of the judgment, the learned Single Judge himself has come to the conclusion that in that case before the Court there was only 50% back wages granted and, therefore, the Court has held that the trial Court in that case has exercised judicial discretion for granting not entire back wages but only 50% thereof. In so far as the judgment of the Apex Court in the case of General manger, Haryana Roadways v. Rudhan Singh (supra) is concerned, the said judgement only states hosts of the factors to be taken into consideration while granting back wages and that the order of back wages should not be without application of mind and should not be given as a matter of course.

6. In the present case, looking at the findings of the Labour Court, the Court has exercised judicial discretion while granting back wages only of 50% and not in entirety and that also after taking into consideration evidence on record. In that light of the matter I do not find any infirmity in the order impugned herein. Petition therefore fails and the same is accordingly dismissed. No

order as to costs.